LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAY 4 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1961

No. 939

JAMES TERRELL KNIGHT, ROY LEE BARRETT, JACKIE HAMILTON GAINEY, CLEVELAND JOHNS AND WILLIAM PRENTIS TUCKER

Petitioners

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth District

JOSEPH H. DAVIS and
J. SEWELL ELLIOTT
Suite 506 Persons Building
Macon, Georgia
Counsel for Petitioners

INDEX

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statutes and Federal Rules Involved 2

Statement of Case 2

Reasons for Granting the Writ 8

Conclusion 11

Certificate of Service 11

Appendix

- Opinion 13
- Judgment 22
- Order Denying Rehearing 21
- Statutes 22
- Federal Rules of Criminal Procedure 26

CITATIONS

BERGER V. UNITED STATES,
295 US 78, 65 SCt 269, 79 L Ed 1314 11

BRYAN V. UNITED STATES,
338 US 552, 70 S Ct. 317, 94 L Ed 335 8

BRYAN V. UNITED STATES, 175 F2d 223 8

KOTTEAKOS V. UNITED STATES,
328 US 750, 90 L Ed 1557 10

UNITED STATES V. CORES,
356 US 405, 78 S Ct. 875, 2 L Ed 2d 873 10

UNITED STATES V. WILLIAMS, 341 US 58, 71 SCt. 595 9

UNITED STATES V. YATES,
354 US 298, 77 SCt. 1064, 1 LEd 2d 1356 9

Statutes and Rules

26 USCA 5601(b) 9

28 USCA 2106 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1961

No.

JAMES TERRELL KNIGHT, ROY LEE BARRETT, JACKIE HAMILTON GAINEY, CLEVELAND JOHNS AND WILLIAM PRENTIS TUCKER

Petitioners

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For The Fifth District

Petitioners, James Terrell Knight, Roy Lee Barrett, Jackie Hamilton Gainey, Cleveland Johns and William Prentis Tucker, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 12th day of January, 1962.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R 242) is reported at 297 F2d 675 and is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 12th day of January, 1962. (R 251). Petitioners filed a petition for a rehearing on the 2nd day of February, 1962 (R 252) which was denied by the Court of Appeals without opinion on the 15th day of March, 1962. The jurisdiction of this Court in envoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. When there has been an appellate determination that the evidence in a criminal case is insufficient to support a judgment for conviction as to a defendant, does due process under the facts of this case, require that the trial court be instructed to enter a judgment of acquittal as to said defendant rather than merely reversing the cause and subjecting said defendant to a new and different trial on the same indictment?

2. Under the facts as disclosed by the record of the proceedings in the trial court, were the rights of petitioners Knight and Johns substantially affected by the introduction of evidence, the sum total of which disclosed separate, distinct and unrelated matters not connected with any general, single and continuing conspiracy?

STATUTES AND FEDERAL RULES INVOLVED

Section 371 of Title 18, of The United States Code: Sections 5179(a), 5601(a), 5173, 5602, 5205(a)(2), 5604(a), 7206(4), 5691(a) and 5222, of the Internal Revenue Code of 1954; Rule 18, Federal Rules of Criminal Procedure, all of which are set forth in the appendix.

STATEMENT OF THE CASE

Appellants were indicted in one count charging a conspiracy to commit certain offenses against the Internal Revenue laws of the United States relating to illicit whiskey, namely:

(1) To possess stills and distilling apparatus;

(2) To engage in and carry on the business of a distiller without having given bond;

(3) To make and ferment mash fit for distillation;

(4) To remove and conceal goods and commodities with the intent to evade the tax thereon;

(5) To remove and conceal distilled spirits on which the tax had not been paid;

(6) To possess distilled spirits, the containers thereof not having the proper stamps affixed showing compliance with law; and

(7) To engage in the business of a wholesale liquor distiller.

Appellants entered their plea of not guilty on April 17, 1961 and were tried before a jury at Macon, Georgia, all being found guilty on April 18, 1961. On April 21, 1961, appellant Knight was sentenced to a term of five (5) years; appellant Gainey was sentenced to serve a term of fifteen (15) months; appellant Johns was sentenced to serve a term of two and one-half (2 1/2) years; and appellant Tucker and appellant Barrett each was sentenced to serve a term of a year and a day. Appellants Knight and Tucker and defendant Stinson, on April 21, 1961, filed their joint motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, and said motion, as to appellant Knight, was overruled and denied on April 21, 1961. On May 5, 1961, said motion as to defendant Stinson and appellant Tucker was heard and after argument, granted as to defendant Stinson, who was thereby ordered released from custody and denied as to appellant Tucker.

On April 2, 1961, appellants Knight, Barrett, Gainey and Johns, timely filed their notice of appeal from the respective judgments entered against them and on May 11, 1961, appellant Tucker timely filed his notice of appeal.

On appeal to the United States Court of Appeals for the Fifth Circuit, the convictions as to petitioners, Knight and Johns, were affirmed but as to petitioners, Barrett, Gainey and Tucker, were reversed and the case remanded for a new trial as to said petitioners. Each petitioner filed his petition for rehearing which was denied on February 2, 1962.

As to the consideration of the first question presented, petitioners, Barrett, Gainey and Tucker, respectfully submit that no detailed recita-

tion of facts is necessary. On the contrary, it appears in the opinion of the Court of Appeals below (Appendix page 16) "That the evidence was not sufficient to support the judgments appealed from as to appellants, Barrett, Gainey and Tucker. No important question of law is involved and nothing will be gained by a detailed recital of the facts as to them, inasmuch as such a course would be of no benefit in connection with any other case involving different facts".

It should be pointed out, however, that as to Gainey the only evidence whatsoever is found at page 14 of the record and is to the effect that he was seated in a truck that was driven by another to the site of an illicit still in Dooly County, Georgia, on March 25, 1960, and at which time he was promptly arrested.

As to Tucker, he was identified as having on one occasion gone to Wilcox County in February, 1960, to weld together a whiskey still in a shed on the premises of witness Hodge. (R 56) Yet witness Ramsey of Detroit, Michigan, testified Tucker was continually employed by him in Detroit from January, 1960 to March 10, 1960 and was in New York on February 16, 1960 and again on March 3, 1960, driving a truck and that the round trip from Detroit to New York took about a week. (R 189)

As to petitioner Barrett, he was identified as having been in Wilcox County "there under the shelter" where the still was supposedly welded by Tucker but "didn't do nothing on it" (R 72) and also as having been in the same truck as Gainey as it drove into the still site in Dooly County on March 25, 1960.

As to the second question presented, petitioners, Knight and Johns, respectfully submit that the factual data must be broken down like separate catagories. The first to be considered will be referred to as the Wilcox County transaction, venue of which would lie in the Americus Division of the Middle District of Georgia.

WILCOX COUNTY TRANSACTION

For present purposes only petitioners concede the evidence shows that in the middle of February, 1960, petitioner Knight contacted one Hodge in connection with engaging in the illicit whiskey business in Wilcox County, Georgia. (R 41) Thereafter the testimony shows various and sundry transactions connected with and relating to the carrying out of this illicit whiskey operation in that County including the hauling of liquor and raw materials, the building of illicit stills, etc. (R 43-58)

Unquestionably, the Wilcox County transactions centered around Hodge but the evidence disclosed that in addition to Hodge and petitioners Knight and Johns being involved, the following parties had some connection: Charlie and Lonnie Horne, one Coley, Eddie Bruns, D. C. Lawson, Sonny McCloud, two city policemen named Hardin and McDuffie, one Blalock and Jack Horne. As we pointed out in the facts pertaining to question one, Tucker and Barrett were named as having also been in Wilcox County.

Of particular significance in connection with this question is the testimony of the co-conspirator, Coley, that he worked in the "liquor business until everything was over, which was sometime the last of March or in April and that as far as he knew and remembered everything was over in April". (R 107)

DOOLY COUNTY TRANSACTION

On March 25, 1960, in Dooly County, Georgia, also within the Americus Division of the Middle District of Georgia, federal officers arrested petitioners, Gainey, Barrett and Johns, as they drove up to the site of an illicit distillery in a truck which the officer testified had been seen on other occasions at a place called Knight's Truck Stop. (R 14) In effect, such is the entire evidence of the Dooly County transaction except that it is significant to note that the record (R 66) shows that one of the principals in the Wilcox County transactions, Hodge,

testified he knew nothing whatsoever of the Dooly County transaction. Further, co-conspirators Coley and Bruns who were involved in the Wilcox County transaction, knew nothing of this Dooly County matter. (R 93) (R 119).

HOUSTON COUNTY TRANSACTION

One of the named co-conspirators, Coley, testified that on one occasion, *the date being unknown,* he came to Knight's Truck Stop, which is located in Houston County, within the Macon Division of the Middle District of Georgia, where petitioner Knight turned over to him an automobile in which to move some whiskey (R 81) and he later brought the whiskey back to a point some five miles below the truck stop and turned it over to unknown parties. (R 82) Presumably, this occasion must have been prior to April, 1960, inasmuch as he had testified that at the end of April everything was over and that he had gotten out of the whiskey business. (R 107)

On May 3, 1960, federal officers seized some raw materials at the home of Jim Colson (R 14-15) which is located in Houston County. However, the entire record in the proceedings below fails to show any connection whatsoever between this isolated transaction and any conspiracy, either in Wilcox, Dooly or Houston Counties, and there was no other evidence connecting Colson to any other activity in either County.

On June 15, 1960 the officers stopped a truck which had thereon some gas cylinders as it approached an intersection located in front of Knight's Truck Stop. Petitioner Johns was driving and one Dan Stinson was a passenger therein, and, as the agent testified, petitioner Knight, "came out from around the truck and started walking off from it". (R 16) However, witness Sherrill testified Knight was at his house and walked off just about the time the truck came by. (R 183) According to the officers, this truck was backtracked to an illicit distillery.

In July, 1960, federal officers observed one Lawrence Knight (work-

ing as a government informer) as he contacted petitioner Johns at Knight's Truck Stop and Lawrence Knight later on that night had in his possession a quantity of untax-paid whiskey, presumably purchased from Johns. (R 150-161). This informer also testified he saw a penny in Johns possession when a whiskey deal was discussed with Johns that he had given petitioner Knight as a means of identifing one who was to contact him concerning liquor.

The record, we respectfully submit, clearly discloses that any Houston County illicit liquor activities began in June or July of 1960 insofar as any conspiracy in said County is concerned. Although the transaction of May 3, 1960 concerning Colson was shown, such, we believe, was too isolated to be considered in this question.

Therefore beginning around June 15, 1960, the record shows activity involving petitioners Johns and Knight in illicit whiskey operations in Houston County within the Macon Division of the Middle District of Georgia.

Petitioners submit that a fair statement is that the record shows considerable illicit whiskey activity in Wilcox County, Georgia, within the Americus Division, participated in *at first* by the witness Hodge and others, including several city policemen; that this operation terminated around the first or middle of February, 1960, at which time petitioners Knight and Johns, in Wilcox County, Georgia, apparently entered into a new and separate operation in said County which was carried on until the latter part of April, 1960; that from the end of April, 1960, up until the middle of June, 1960, the record is silent as to the existence of any conspiracy either in Wilcox County, within the Americus Division, in Dooly County, within the Americus Division or in Houston County, within the Macon Division; that beginning around June 15, 1960, a new, separate, distinct and unrelated activity was commenced which the evidence shows involved petitioners Knight and Johns but did not involve petitioners Barrett, Gainey and Tucker.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. This case presents a strikingly peculiar situation which calls for a reexamination of this Court's opinion in BRYAN V. UNITED STATES, 338 US 552; 70 SCt 317, 94 Led 335. It has been judicially determined by the Court of Appeals below that the evidence as to the petitioners, Barrett, Gainey and Tucker, is insufficient to sustain a conviction. These petitioners at the outset concede that in the trial court below each filed his motion for a judgment of acquittal and, in the alternative, for a new trial. However, in view of the disposition made by the appellate court, it is clear that the reversal was not due to any error occurring during the trial. Instead, it was based upon the insufficiency of the evidence. This factor alone distinguishes the case as to these appellants from other decisions of this Court wherein it did appear that the reversal below was based upon errors committed either in the charge or during the course of the trial which adversely affected said trial. The opinion below, while considering the errors assigned, apparently disregarded same as being of no substance.

"We thus reach the question of whether the direction of a new trial by the Court of Appeals was an 'appropriate' judgment which was just' under the circumstances and, therefore, authorized by Section 2106, or whether, as petitioner contends, it was mandatory that the Court of Appeals enter a judgment of acquittal." BRYAN V. UNITED STATES, 338 US 552 at page 559. In this case, as in the Bryan case, supra, we do not have any expression of the court below as to whether "the defect in the evidence might be supplied on another trial." See BRYAN V. UNITED STATES, 175 F2d 223 at page 229. It would seem to be emphatically clear that neither now nor at any time in the future would the evidence be sufficient to sustain the conviction of petitioner Gainey of any general conspiracy as was charged in the one count indictment. He was seen on one occasion at the site of an illicit distillery in Dooly County, Georgia. We are not concerned with his guilt from a substantive offense standpoint which would bring into operation the presumption that follows from mere

unexplained presence at the site of an illicit distillery, see 26 U.S.C. A 5601(b), but are concerned with his guilt as a member of a conspiracy. This Court has said that to be present at a crime is not evidence of guilt as an aider or abettor. See UNITED STATES V. WILLIAMS, 341 US 58, 71 SCt 595. The same might be said of petitioner Tucker who was present on only one occasion in Wilcox County, Georgia, where an illicit still was being manufactured. There was no evidence to show any guilty knowledge on his part in any *conspiracy*, albeit, he knew what he was working on, and the evidence at most shows the performance by him of a mechanical function.

Petitioner Barrett, like petitioner Gainey, was merely present at the scene of the illicit distillery in Dooly County, Georgia, but, in addition, was seen "standing around" under the shed during the welding operation on the illicit still.

The record fails to show any instances wherein the Government was precluded from presenting any material evidence. Consequently, it would seem to be fair to assume that the evidence on a retrial would be the same as reflected by the record herein. Can it be said then, that the direction of the Court of Appeals was an "appropriate judgment" which was "just" under these circumstances.

This Court in YATES V. UNITED STATES, 354 US 298, 1 LEd 2nd 1356, 77 SCt 1064, has recognized the need for close scrutiny in these instances in which an injustice would result in permitting a new trial even though, under BRYAN, such a new trial would be authorized. Therein it was said:

> "The determinations already made require a reversal of these convictions. Nevertheless, in the exercise of our power under 28 USC 2106 to 'direct the entry of such appropriate judgment . . . as may be just under the circumstances,' we have conceived it to be our duty to scrutinize this lengthy record with care, in order to determine whether the way should be left open for a new trial of all or some of these petitioners. Such a judgment,

> we think, on the one hand, foreclose further proceedings against those of the petitioners as to whom the evidence in this record would be palpably insufficient upon a new trial, and should, on the other hand, leave the Government free to retry the other petitioners under proper legal standards, especially since it is by no means clear that certain aspects of the evidence against them could not have been clarified to the advantage of the Government had it not been under a misapprehension as to the burden cast upon it by the Smith Act. In judging the record by these criteria we do not apply to these cases the rigorous standards of review which, for example, the Court of Appeals would be required to apply in reviewing the evidence if any of these petitioners are convicted upon a retrial. Compare Dennis v. United States, Supra 341 US at 516. Rather, we have scrutinized the record to see whether there are individuals as to whom acquittal is unequivocally demanded."

To require the petitioners Barrett, Gainey and Tucker to undergo a new and different trial under the evidence against them would not be the "just" or "appropriate" judgment as to them. Where an acquittal is demanded, it is violative of the clear mandate of 28 USCA 2106 to merely order a new trial.

2. The decision below cannot be squared with the decision of this Court in KOTTEAKOS V. UNITED STATES, 328 U.S. 750, 90 L Ed. 1557, inasmuch as the facts as to petitioners Knight and Johns, show at least three separate spheres of operation, two of which were in divisions other than the one in which they were tried and convicted. Thus, they have suffered substantial prejudice, particularly from the standpoint of venue requirements that they be tried where "the crime" was committed. UNITED STATES V. CORES, 356 US 405, 407, 78 SCt. 875, 877, 2 L Ed 2d 873. Conspiracy under 18 USC 371 is a "crime".

If the evidence was sufficient to show the inception and termination of a conspiracy in Wilcox County, venue would have been laid in the Americus Division. The same is true of the Dooly County transaction. To try all together in the Macon Division under the one court indictment herein substantially prejudiced appellants Knight and Johns.

The harmless error statute has no application for the reason that certainly two, possibly three, crimes of equal magnitude have been tried together with the venue requirements of the indictment being *substantially* met by proof drawn from another separate conspiratorial enterprise of petitioners in another and separate geographical division of the trial court.

The questions herein raised as to the prejudicial effect of the variance assumes greater importance when viewed in light of the venue requirements of the Constitution. Absent those, BERGER V. UNITED STATES, 295 US 78, 65 S Ct 269, 79 LEd 1314 might be dispositive of the fatal variance contention. But their presence herein alone warrants a review notwithstanding BERGER.

CONCLUSION

The questions presented by this case are of great and recurring significance in the administration of the criminal law. The serious questions of public policy and individual rights involved here and the effect of the decision below, if not reviewed and reversed, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

For these reasons and the reasons set forth above, it is respectfully submitted that the petition for the writ of certiorari should be granted.

CERTIFICATE OF SERVICE

I, Joseph H. Davis, do certify that I have on the date shown below served the within petition (1) by mail upon the Solicitor General, Department of Justice, Washington 25, D. C., by depositing same in the United State Post Office with sufficient air mail postage prepaid, addressed to him at his post office address in accordance with Rule 33(1) Supreme Court Rules, and (2) upon the Hon. Floyd M. Buford, United States Attorney, Middle District of Georgia, Post Office Box 118, Macon, Georgia, the attorney of record who represented the United

States in the Court whose judgment is sought to be reviewed, by delivering same at the office of said counsel of record, in accordance with Rule 33(2), Supreme Court Rules.

THIS 3 DAY of May, 1962.

Joseph H. Davis

JOSEPH H. DAVIS
J. SEWELL ELLIOTT
Suite 506 Persons Bldg.
Macon, Georgia

Counsel of record for petitioners

APPENDIX

OPINION

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 18966

JAMES TERRELL KNIGHT, ROY LEE BARRETT, JACKIE HAMILTON GAINEY, CLEVELAND JOHNS and WILLIAM PRENTIS TUCKER,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(January 12, 1962)

Before TUTTLE, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: James Terrell Knight, Amos Barlow, Roy Lee Barrett, Jim Colson, Jackie Hamilton Gainey, Cleveland Johns, Dan Stinson and William Prentis Tucker were indicted for conspiring in violation of 18 U.S.C. Sec. 371, to violate various sections

of the Internal Revenue Code,[1] 'to possess and control stills for the production of distilled spirits, to ferment mash for distillation, to conceal and remove distilled spirits, and otherwise to violate the Code sections dealing with the unlawful handling of distilled liquors and the means by which they were manufactured and distributed. Amos Barlow plead guilty, and the court below eliminated Dan Stinson after he had been convicted by the jury. The remaining defendants were found guilty by the jury and sentenced to terms of imprisonment. Colson did not appeal, and before us are Knight, Johns, Barrett, Gainey and Tucker who appeal from the judgments sentencing them after conviction under the jury's verdict.

The indictment charges that twelve other named persons were engaged in the same conspiracy along with divers others unknown to the grand jury. These twelve were not indicted by the grand jury. The Government used four of these, Eddie B. Bruns, Johnny Coley, Jr., Thomas W. Hodge, and Monroe Mims, as witnesses, and the case depends largely upon their testimony along with that of William W. Williams, a government employee.

The appellants base their appeal upon various errors which they claim the court below committed in the trial. Chief among these is that the large number of violations of the revenue laws disclosed by the evidence were not shown to be the result of a single conspiracy; and that the violations charged against the appellants were not related to or connected with the conspiracy established by the government; and that venue jurisdiction in the Macon Division of the Middle District of Georgia was not shown as to the charges against the several appellants. The other errors charged by the appellants,

[1] §§5179 (a), 5601 (a), 5176, 5602, 5205 (a) (2), 5604 (a), 7206 (4), 5691 (a) and 5222 of Title 26 U. S. C.

which may be referred to as minor errors, will be taken up after discussion of the main point.

This being a charge of conspiracy in violation of 18 U.S.C. Sec. 371, *supra*, it is necessary that each of the accused be connected with the conspiracy by proof beyond a reasonable doubt. Venue jurisdiction is an important element of that proof. Concerning it, the Supreme Court recently stated in *United States v. Cores*, 356 U.S. 405, 407:

> "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. ('In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . .' U.S. Const., Amend. VI). This principle is reflected in numerous statutory enactments, including Rule 18, Fed. Rules Crim. Proc., which provides that except as otherwise permitted, 'the prosecution shall be had in a district in which the offense was committed . . .' In ascertaining this locality we are mindful that questions of venue 'raise deep issues of public policy in the light of which legislation must be construed.' . . . The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused, is prosecuted in a remote place. Provided its language permits, the Act in question should be given that construction which will respect such considerations."

A careful reading of this long and muddled record convinces us that there was sufficient evidence to connect appellants Knight and Johns with the conspiracy which was established and with overt acts charged in the indictment and committed in Houston County, Georgia, which is in the Macon Division, cf. *Hyde v. United States*, 225 U.S.

347, and *Ladner v. United States*, 5 Cir., 1948, 168 F. 2d 771; but that the evidence was not sufficient to support the judgments appealed from as to appellants Barrett, Gainey and Tucker. No important question of law is involved, and nothing will be gained by a detailed recital of the facts as to them, inasmuch as such a course would be of no benefit in connection with any other case involving different facts.

By the witness Hodge it was established that appellant Knight, who operated a truck stop in Houston County, came to Hodge at or near his residence in Wilcox County, Georgia, seeking to enter into partnership with Hodge in the manufacture, handling and sale of untax-paid liquor. Hodge was the owner of several stills which were already in operation, and Knight wanted to furnish an outlet for the moonshine whiskey Hodge was manufacturing and to interest him in setting up other stills, all of which Hodge and Knight were to operate on a fifty-fifty basis. Knight was to put up some money, to furnish some additional equipment for the installation of additional stills, and to provide transportation for the illicit whiskey. Hodge was eager to enter into the agreement, because he did not have an adequate market for the whiskey he was already producing.

These negotiations transpired outside the Macon Division, but a number of overt acts charged in the indictment were established to have taken place at or near Knight's truck stop in the Macon Division in which appellants Knight and Johns, along with a number of the other individuals named as participants by the indictment but not included in it as defendants, participated, which acts were bound up with the conspiracy entered into between Knight and Hodge. These including the hauling of butane gas cylinders, along with other component parts of illicit distilleries, the furnishing of vehicles at Knight's truck stop for use in transporting liquor, the hauling of whiskey to the Knight Truck Stop, operations centering around the truck stop which

were carried on in an effort to recover some whiskey stolen from a still in Wilcox County, the storing of materials for manufacture of stills at the home of appellant Colson in Houston County, and operation of a truck from Knight's truck stop which was backtracked to a whiskey still in the woods about two miles away. In several of these activties appellants Knight and Johns were active participants.

The Government made an extended effort to connect appellant Tucker with the conspiracy. Hodge first testified that Tucker accompanied Knight to Hodge's place when the conspiracy was first made, which date Hodge fixed rather definitely as February 15, 1960. Later, Hodge testified that he had seen Tucker only once and that was when Tucker was engaged in Hodge's shed welding on a liquor still for him and appellant Knight. He placed this as somewhere about the later part of February. Another witness also stated that he saw Tucker welding on a still under Hodge's shed. The ultimate destination of those stills, whether Tucker knew about the prospective owners, as well as all of the other testimony concerning Tucker, was of a vague and unconvincing nature. Nor was any witness able to identify Tucker at the defendants' table during the trial.

The entire fabric of testimony against Tucker is brought in question by the testimony of a witness from Detroit, Michigan, who testified that he had employed Tucker to drive a truck for him in the Detroit territory and that Tucker worked there with him from the middle of January until about March 10, 1960, during which time he saw Tucker frequently. The witness placed in evidence about twenty cancelled checks and two invoices all bearing the signature of Tucker and tending to establish his presence in Detroit or at nearby points during the crucial dates around the middle and latter part of February. The checks were issued to Tucker and bore Tucker's endorsement and were cashed or handled through banks in the Detroit area during that

period. This evidence tended to confirm Ramsey's testimony and to establish Tucker's presence there at the time Hodge was placing him at Hodge's home in Georgia.[2]

On the whole, although there was evidence tending to sustain the Government's case, including two checks, we think that the evidence, particularly as to Tucker's participation in the conspiracy, was too weak to support his conviction. We think the same with respect to the testimony against appellants Barrett and Gainey,[3] but, as stated, no useful purpose will be served by detailing it here.

We will advert briefly to the objections entered by appellants to various acts of the prosecuting attorney during the trial. During his argument, the attorney picked up what his opponent stated was the Government's file in the case, with the statement: "We have a whole catalog of evidence here." Upon objection by attorneys for the appellants, the court stated: "Yes, the catalog has not been introduced as such." The Government's attorney responded "All right, sir. I stand corrected." Thereupon the court stated: "I take it that your reference is simply to the testimony from the stand."

Again, the prosecutor mentioned in his closing argument that he had charged in his opening statement more than $143,000 in tax money had been evaded in the operation of the conspiracy. He followed with: "Now those figures, which were compiled by the Internal Bureau Service—" when objection was made by appellants' counsel: "If Your Honor please, I think perhaps we are going a little too far

---

[2]Checks issued to Tucker were cleared through banks in or near Detroit on February 4, February 5, February 11, February 15, February 17 (two), February 23 (2), and February 25. An invoice on which Tucker had signed his name as receiving goods on February 16 was also introduced.

[3]Williams testified that cases involving substantive crimes were pending against Barrett, Colson and Gainey.

in referring these figures . . . I hate to interrupt counsel but I feel I must do so. The court responded: "Well, of course there is no actual evidence as to how they were compiled. If you wish just to infer from the evidence argue to the jury that you infer. I think that would be proper, but there is no specific evidence as to who made the compilation."

Objection is also made that the court below, in its charge, merely defined what under the law an accomplice was without the explanation that the judge was not inferring that anyone was an accomplice. When objection to this was made, the jury was brought back, and the court made a full explanation that its reference had been made only to "alleged accomplices," assuring the jury that it did not intimate any opinion one way or the other, as to whether any person in the case was guilty, either the witnesses or the defendants.

Appellants point out a number of instances when the prosecuting attorney persisted in asking questions which were leading and otherwise objectionable, taking the position that the cumulative effect of all of these was to deny appellants a fair trial. There is no doubt that this objection is factually supported by the record. Throughout the trial leading questions were asked, and the court cautioned government counsel against the practice more than once; but, each time, the court sustained the objection and corrected as far as it could, whatever prejudice might have resulted.

These objections, on the whole, deal with the minutiae of the trial, and the court handled each episode as it arose in such a way as not, in our opinion, to prejudice the rights of the appellants in the situation with which we are faced here. In a close case where the evidence is not strong, this cumulation of errors might call for reversal. But the guilt of Knight and Johns is so clear that we are not constrain-

ed to disturb the judgment against them. Cf. *Hagans v. United States*, 5 Cir., 1959, 261 F. 2d 924, 928-929, and *Fogarty v. United States*, 5 Cir., 1959, 263 F. 2nd 201, 204 et seq.

The judgment of the court below as to appellants James Terrell Knight and Cleveland Johns is affirmed; as to appellants Roy Lee Barrett; James Hamilton Gainey and Prentis Tucker it is reversed and the case is remanded for a new trial.

TUTTLE, Chief Judge, CONCURRING IN PART AN DISSENTING IN PART

I agree with that part of the opinion that affirms the judgment of the trial court as to Knight and Johns and also as to that part that reverses as to appellants Barrett and Gainey. As to the judgment of conviction of William Prentis Tucker I respectfully dissent. Two witnesses, including Hodge, one of the primary participants in the agreement to construct and operate the stills, positively testified that Tucker participated in the building of the stills in a shed on Hodge's property. I think the fact that there was ambiguous testimony which at most might authorize the jury to find an alibi for Tucker does not warrant our holding that a jury did not have before it sufficient evidence from which it could determine beyond a reasonable doubt that Tucker participated in the conspiracy.

I would, therefore, affirm the judgment of conviction as to Tucker as well as Knight and Johns.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 18966

JAMES TERRELL KNIGHT, ROY LEE BARRETT, JACKIE HAMILTON GAINEY, CLEVELAND JOHNS, and WILLIAM PRENTIS TUCKER

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Middle District of Georgia

(March 15, 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM.

IT IS ORDERED that the appellants' petition for rehearing be, and it is hereby DENIED.

Petition for Rehearing filed 2-2-62
Petition for Rehearing denied 3-15-62

JUDGMENT

Extract from the Minutes of January 12, 1962.

JAMES TERRELL KNIGHT, ROY LEE BARRETT, JACKIE HAMILTON GAINEY, CLEVELAND JOHNS and WILLIAM PRENTIS TUCKER

No. 18966 versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court as to appellant James Terrell Knight and Cleveland Johns in this cause be, and the same is hereby, affirmed; as to appellants Roy Lee Barrett, James Hamilton Gainey and Prentis Tucker the judgment is reversed, and that this cause be, and it is hereby, remanded to the said District Court for a new trial.

"Tuttle, Chief Judge, Concurs in Part and Dissents in Part."

STATUTES AND FEDERAL RULES INVOLVED

18 USC 371. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such con-

spiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 USCA, 5179(a). Requirements. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its capacity, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used (except that stills or distilling apparatus not used or intended to be used for distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section).

26 USCA 5601(a). Unregistered stills. Any person who has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a).

26 USCA 5602. Whenever any person engaged in or carrying on the business of a distiller defraus, attempts to defraud, or engages in such business with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. No discontinuance or nolle prosequi of any prosecution under this section shall be allowed without the permission in writing of the Attorney General. Added Pub. L. 85-859, Title II, 201, Sept. 2, 1958, 72 Stat. 1400.

26 USCA 5205(a)(2): Stamps.

(a) Stamps or containers of distilled spirits. —

(1)Containers of distilled spirits bottled in bond. Every container of distilled spirits bottled in bond under section 5233 when filled shall be stamped by a stamp evidencing the bottling of such

spirits in bond under the provisions of this paragraph and section 5233.

(2) Containers of other distilled spirits.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax of indicating compliance with the provisions of this chapter. The provisions of this paragraph shall not apply to—

(A) distilled spirits, lawfully withdrawn from bond, placed in containers for immediate consumption on the premises or for preparation for such consumption;

(B) distilled spirits in bond or in customs custody;

(C) distilled spirits, lawfully withdrawn from bond, in immediate containers stamped under other provisions of internal revenue or customs law or regulations issued pursuant thereto;

(D) distilled spirits, lawfully withdrawn from bond, in actual process of rectification, blending or bottling, or in actual use in processes of manufacture;

(E) distilled spirits on which no internal revenue tax is required to be paid;

(F) distilled spirits lawfully withdrawn from bond and not intended for sale or for use in the manufacture or production of any article intended for sale; or

(G) any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

26 USCA 5608(a). Penalties relating to stamps, marks, brands, and containers.

(a) General.—Any person who shall —

(3) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section.

26 USCA 7206(4). Fraud and false statements. Any person who

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title.

26 USCA 5691(a). Penalties for nonpayment of special taxes relating to liquors.

(a) General.—Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, retail dealer in beer, limited retail dealer, or manufacturer of stills, and willfully fail to pay the special tax as required by law, shall be fined not more than $5,000, or imprisoned not more than 2 years, or both, for each such offense.

26 USCA 5222. Production, receipt, removal, and use of distilling materials.

(a) Production, removal, and use. —

(1) No mash, wort, or wash fit for distillation or for the production of distilled spirits shall be made or fermented in any building or on any premises other than on the bonded premises of a distilled spirits plant duly authorized to produce distilled spirits according to law; and no mash, wort, or wash so made or fermented shall be removed from any such premises before being distilled, except as authorized by the Secretary or his delegate; and no person

other than an authorized distiller shall, by distillation or any other process, produce distilled spirits from any mash, wort, wash, or other material.

Rule 18, Federal Rules of Criminal Procedure. District and Division.

Except as otherwise permitted by stature or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

26 USCA 5173. Qualification bonds.

(a) General provisions.—Every person intending to commence or to continue the business of a distiller, bonded warehouseman, or rectifier, on filing with the Secretary or his delegate an application for registration of his plant, and before commencing or continuing such business, shall file bond in the form prescribed by the Secretary or his delegate, conditioned that he shall faithfully comply with all the provisions of law and regulations relating to the duties and business of a distiller, bonded warehouseman, or rectified, as the case may be (including the payment of taxes imposed by this chapter), and shall pay all penalties incurred or fines imposed on him for violation of any of the said provisions.

(b) Distiller's bond.—Every person intending to commence or continue the business of a distiller shall give bond in a penal sum not less that the amount of tax on spirits that will be produced in his distillery during a period of 15 days, except that such bond shall be in a sum of not less than $5,000 nor more than $100,000.